IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 3.4.2007

CORAM:

THE HONOURABLE MR.JUSTICE C.NAGAPPAN

Second Appeal No.651 of 1996

Nanjappa Gounder
S/o.Karuppa Gounder
Kongarpalayam,
Vaniputhur Village,
Gobichettipalayam. .. Appellant

-Vs-

1.N.Subramaniam
S/o.Nallasami Chettiar
Teacher, Cusba Gobichettipalayam,
Gobi, Periyar District.

2.Makaliammal
W/o.G.K.Chenniappan

3.Minor Sudha
D/o.G.K.Chenniappan

4.Minor Kavitha
D/o.G.K.Chenniappan

5.Minor Jagadeesh

(Minors 3 to 5 are represented
by mother and guardian R2).

(Respondents 2 to 5 reside at
5, Rayar Extension,
Gobi Town, Periyar District). .. Respondents

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Second appeal is filed against the judgment and decree, dated 31.1.1996, passed in A.S.No.105 of 1991 on the file of Subordinate Judge, Gobichettipalayam reversing the judgment and decree, dated 18.12.1990, made in O.S.No.682 of 1985 on the file of Additional District Munsif, Gobichettipalayam.

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For appellant : Mrs.Hema Sampath
Senior Counsel
for M/s.R.Subramanian,
R.Meenal.

For respondents : Mr.K.Doraisami
Senior Counsel
for M/s.Muthumani Doraisami,
K.Balasubramanian,
Nissar Ahamed.
for Respondents 2 to 5.

No appearance for R1.

JUDGMENT

This Second Appeal is preferred against the judgment and decree, dated 31.1.1996, passed in A.S.No.105 of 1991 on the file of Subordinate Judge, Gobichettipalayam reversing the judgment and decree, dated 18.12.1990, made in O.S.No.682 of 1985 on the file of Additional District Munsif, Gobichettipalayam. The plaintiff is the appellant herein.

2.The appellant filed the suit seeking for a decree declaring his title to the suit properties and for permanent injunction restraining the defendants from interfering with his possession and enjoyment of the suit properties.

The case of the plaintiff is that he entered into an agreement of sale with the second defendant on 25.8.1978 to purchase the suit properties and took possession of the same on the same date and the second defendant executed a sale deed on 29.11.1978 and completed the contract and the sale relates back to the date of agreement since the plaintiff was put in possession on the said date. It is further stated by the plaintiff that the first defendant appears to have brought the suit properties for sale in execution of the decree he obtained against the second defendant and the plaintiff was not aware of any attachment over the suit properties and the attachment said to have been made is not binding on the plaintiff since he is a bonafide purchaser for value and the auction sale in favour of the third defendant is not valid in law. The plaintiff has further stated that he filed a claim application in the Execution Petition and the Execution Petition itself was dismissed for default and the Executing Court has no legal authority to restore it and the order of restoration without notice to the real owner is bad in law and it is not binding on the plaintiff and the second defendant has no subsisting

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title on the date of attachment also and the third defendant cannot claim any better title to the suit properties and the plaintiff is in possession of the suit properties and the defendants 1 and 3 are attempting to interfere with his possession and hence the suit is filed.

3. The defendants 1 and 3 filed a common written statement denying the plaint averments and stated that the first defendant gave a loan of Rs.3,500/- to the second defendant on 25.9.1977 and no amount was forthcoming and hence the first defendant filed the suit in O.S.No.1462 of 1978 on 16.9.1978 against the second defendant and obtained an order of attachment before judgment of the suit properties on the same day in I.A.No.3041 of 1978 and the attachment was made absolute on 23.11.1978 and the suit itself was decreed on 30.11.1978. It is further stated in the written statement that the execution proceedings were taken against the second defendant in E.P.R.No.176 of 1979 and the suit properties were sold in public auction on 30.7.1980 to the third defendant and the sale was duly confirmed on 22.1.1983 and the sale certificate was also issued and the plaintiff was fully aware of all these proceedings and the third defendant applied for delivery of the suit properties and the possession was handed over to the third defendant by the Court on 23.12.1983 and the same was duly confirmed in E.A.No.1364 of 1983 on 1.4.1984 and the third defendant is in possession and enjoyment of the suit properties eversince then.

According to defendants 1 and 3, the plaintiff filed a claim petition in E.A.No.638 of 1980 in E.P.R.No.176 of 1979 and the same was dismissed on 29.7.1982 and the order has become final and the plaintiff has no right to file the present suit seeking for declaration of his title. It is further stated in the written statement that the sale agreement putforth by the plaintiff prescribed a period of three months from 25.8.1979 and it had come to an end on 25.11.1978 and there was no separate valid agreement under law extending the period and there was no subsisting valid agreement on 29.11.1978 and the second defendant was having title and possession of the suit properties on the date of attachment and the sale in favour of the plaintiff by the second defendant subsequent to the date of attachment will not vitiate the Court sale in favour of the third defendant and the plaintiff is not a bonafide purchaser for value and he is not in possession of the suit properties.

4. During the pendency of the suit, the second defendant died and the suit stood abated as against him. The Trial Court, on consideration of oral and documentary evidence, held that the first defendant knew about the registered sale agreement entered into by the plaintiff with the second defendant at the time of filing his

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petition seeking for attachment of the suit properties before judgment in his suit and the sale in favour of the plaintiff is in pursuance of agreement for sale, which was before the attachment and hence the purchase made by the plaintiff prevails against the attachment and the suit is maintainable and the plaintiff is in possession of the suit properties and granted decree as prayed for with costs. Aggrieved by the judgment and decree, the defendants 1 and 3 preferred appeal to the Sub-Court, Gobichettipalayam and during the pendency of the appeal, third defendant died and his legal representatives have been added as appellant Nos.3 to 6. The appellate Court held that the attachment of the suit properties is valid and the sale agreement was not in force on the date of attachment and hence the attachment will bind the plaintiff and prevail over his purchase and the sale in favour of the plaintiff after attachment is void as per Section 64 of Civil Procedure Code and the possession of the plaintiff is unlawful and the suit is not maintainable and allowed the appeal and dismissed the suit. Challenging the same, the present second appeal is preferred. For the sake of convenience, in this Judgment, the parties are referred to as arrayed in the suit.

5. In this Second Appeal, the following substantial questions of law are framed for consideration:

> 1. Whether the lower appellate Court has erred in overlooking that the agreement for sale would prevail over attachment as the contractual obligation arising from the sale agreement would override the rights of the attaching creditor.
>
> 2. Whether in law the lower appellate Court was not wrong in finding that the suit was not maintainable.

6. Mrs.Hema Sampath, the learned Senior Counsel appearing for the appellant contended that though the purchase of the suit properties was made by the plaintiff subsequent to the attachment, the agreement in pursuance of which the purchase made was prior to the attachment and hence the purchase shall prevail over the attachment and this Court, in a number of decisions, held that the purchaser of an antecedent agreement gets good title despite attachment and this view has been approved by the Supreme Court in the decision in VANNARAKKAL KALLALATHIL SREEDHARAN v. CHANDRAMAATH BALAKRISHNAN AND ANR. (JT 1990 (1) S.C. 390).

7. Per contra, Mr.K.Doraisami, the learned Senior Counsel appearing for the respondents contended that a sale in pursuance of a pre-attachment agreement is a private alienation of property and must be regarded as void against the claim of the attaching

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creditor as provided under Section 64 of Civil Procedure Code and further submitted that the Supreme Court in a subsequent decision in JANGLI AND OTHERS v. BHAGWATI (SMT) AND OTHERS ((1995) 6 Supreme Court Cases 140) has observed that some observations made in Vannarakkal Kallalathil Sreedharan case (cited supra) need to be clarified and shall be considered in an appropriate case and hence the law laid down in Vannarakkal Kallalathil Sreedharan case, cannot be the correct legal position on this aspect.

8. It is not in dispute that the suit properties belonged to the second defendant. Ex.A2 is the registered sale agreement entered by the plaintiff with the second defendant with respect to the suit properties on 25.8.1978 and the time stipulated therein was three months. The first defendant filed the suit for recovery of money on a pronote against the second defendant on 16.9.1978 and obtained an order of ad interim attachment before judgment of the suit properties on the same day and that attachment was made absolute on 23.11.1978. Exs.A22 and A23 are endorsements, dated 23.11.1978, made by second defendant and his wife in Ex.A2 sale agreement extending the time till 30.11.1978 and the defendants 1 and 3 raised a doubt as to the genuineness of the endorsements which was repelled by the trial Court and found acceptance before the lower appellate Court. There is no need to discuss further on this point since the time was not the essence of contract and the sale itself took place on 29.11.1978. The first defendant in his oral testimony as DW.1 has stated that he heard about the registered sale agreement entered into by the plaintiff with the second defendant and immediately he filed the suit and obtained an order of attachment before judgment of the suit properties.

9. Venkatasubba Rao, J., a learned single Judge of this Court, in the decision in PAPARAJU VEERARAGHAVAYYA v. KILLARU KAMALA DEVI AND OTHERS (A.I.R. 1935 Madras 193), laid down that where a purchase is subsequent to the attachment, but the agreement in pursuance of which the purchase is made, is prior to the attachment, the purchase prevails against the attachment.

10. A Division Bench of this Court concurred with the above reasoning of the learned Judge in the decision in VEERAPPA THEVAR AND OTHERS v. C.S.VENKATARAMA AIYAR AND OTHERS (A.I.R. 1935 Madras 872) and held that an agreement to sell creates an obligation to convey the property and a latter attachment will not override the conveyance made in performance of that obligation.

11. Following the above decision, another Division Bench of this Court, in the subsequent decision in ANGU PILLAI AND OTHERS v. M.S.M.KASIVISWANATHAN CHETTIAR AND OTHERS (AIR 1974 MADRAS 16), held that an attaching decree-holder attaches not the physical

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property but only the right of the judgment-debtor in the property and as recognised in Section 40 of the Transfer of Property Act, the right of the judgment-debtor in the property is, on the date of the attachment of the property qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor.

12. The Supreme Court referred to all the above three decisions of this Court and accepted the line of reasoning that the purchaser of an antecedent agreement gets good title despite attachment in its decision in VANNARAKKAL KALLALATHIL SREEDHARAN v. CHANDRAMAATH BALAKRISHNAN AND ANR. (JT 1990 (1) S.C.390). For better appreciation, the law laid down is extracted below:

> "9. In our opinion, the view taken by the High Courts of Madras, Bombay, Calcutta and Travancore-Cochin in the aforesaid cases appears to be reasonable and could be accepted as correct. The agreement for sale indeed creates an obligation attached to the ownership of property and since the attaching creditor is entitled to attach only the right, title and interest of the judgment-debtor, the attachment cannot be free from the obligations incurred under the contract for sale. Sec. 64 CPC no doubt was intended to protect the attaching creditor but if the subsequent conveyance is in pursuance of the agreement for sale which was before the attachment, the contractual obligation arising therefrom must be allowed to prevail over the rights of the attaching creditor. The rights of the attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property. The attaching creditor cannot ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. We cannot, therefore, agree with the view taken by the Punjab and Haryana High Court in Mohinder Singh's case (AIR 1971 Pb. & Haryana 381).

13. The contention of the learned Senior Counsel for the respondents that the above view cannot be taken as a correct legal position on account of observation made by the Supreme Court in the subsequent decision in JANGLI AND OTHERS v. BHAGWATI (SMT) AND OTHERS ((1995) 6 Supreme Court Cases 140), is devoid of merit. The question that arose for consideration in the subsequent case was as

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to whether the appellant being a derivative title holder, can challenge the money decree, because of or independently of, pre-emption decree and the Apex Court held that he is bound by the decree as judgment-debtor and cannot seek any declaration of his independent title thereof. After having decided so, in the concluding paragraph, the Supreme Court observed thus:

> " 6. In this view, it is not necessary for us to go into the controversy whether some observations made in Vannarakkal Kallalathil Sreedharan v. Chandramaath Balakrishnan need to be clarified and correct legal position stated, which would be considered in an appropriate case."

14. The Supreme Court did not consider the law laid down in the decision in Vannarakkal Kallalathil Sreedharan case (supra) and has left it open to be considered in an appropriate case. Meanwhile, the Parliament has given its legislative approval to the view taken by the supreme Court in VANNARAKKAL KALLALATHIL SREEDHARAN case by inserting clause (2) to Section 64 of Civil Procedure Code, under Act 22 of 2002, which came into effect from 1.7.2002. The present Section 64 C.P.C. reads thus:

> "64. Private alienation of property after attachment to be void.- (1) Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims enforceable under the attachment.
>
> (2) Nothing in this section shall apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment."

Though this amendment may not enure to the benefit of the plaintiff, the law declared by the Apex Court in the decision in VANNARAKKAL KALLALATHIL SREEDHARAN v. CHANDRAMAATH BALAKRISHNAN AND ANR. (JT 1990 (1) S.C. 390) squarely applies to the facts of the present case and the rights of the first defendant as attaching creditor shall not be allowed to override the contractual obligation arising from an antecedent agreement for sale of the attached property and the first substantial question of law is answered in favour of the appellant.

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15. The finding of the lower appellate Court is that the attachment would prevail over the agreement for sale and it will be binding on the plaintiff and the suit filed without a prayer for setting aside the attachment is not maintainable. As already seen, the contractual obligation arising from an antecedent agreement for sale of the attached property shall prevail over the rights of the attaching creditor and the suit is maintainable. Hence the above finding of the lower appellate Court is erroneous in law and the second substantial question of law is answered in favour of the appellant.

16. In view of the conclusions reached, the judgment and decree of the lower appellate Court are liable to be set aside and the judgment of the trial Court has to be restored and the plaintiff is entitled to the relief of declaration of his title to the suit properties. Moreover, both the Courts have concurrently found that the plaintiff is in possession of the suit properties and hence the plaintiff is also entitled for the relief of permanent injunction.

17. In the result, the second appeal is allowed and the judgment and decree of the lower appellate Court are set aside and the suit is decreed as prayed for with costs throughout.

vks

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Subordinate Judge, Gobichettipalayam (with records)
2. The Additional District Munsif, Gobichettipalayam.
3.The Section Officer, V.R.Section, High Court, Madras.

+ 1 cc to Mr. R. Subramanian, Advocate SR No. 21190
+ 1 cc to Mrs. Muthumani Dorasami, Advocate SR No. 21112

AKM(CO)
SR/9.5.2007

Judgment
in
S.A.No.651 of 1996

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